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Issue Date: 23 February 2004

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In the Matter of:

ADMINISTRATOR, WAGE AND HOUR
DIVISION, U.S. DEPARTMENT OF LABOR
Prosecuting Party, Case No.: 2003-LCA-00014

v.

TEACHERS' PLACEMENT GROUP, et al.,
Respondent.
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DECISION AND ORDER

This matter arises under the Immigration and Nationality Act H-1B visa program, 8 U.S.C. Sec. 1101 (a)(15)(H)(I)(b) ("Act") and the implementing regulations at 20 C.F.R. Part 655, Subparts H and I, 20 C.F.R. § 655.700 et seq.

The Administrator of the Wage and Hour Division ("Administrator") issued a determination letter pursuant to 20 C.F.R. § 655.815 to Teacher's Placement Group Inc., Michael Vanjani, and Radha Vanjani ("Respondents") on February 5, 2003 asserting that Respondents willfully failed to pay required wages to fifteen H-1B non-immigrant aliens who were brought to the United States to be employed as teachers in the Newark Public School System; discriminated against those teachers; and failed to comply with the provisions of subpart H or I of 20 C.F.R. § 655.700, more specifically, failed to establish a prevailing rate in compliance with the regulatory provision for a Labor Condition Application. The determination letter also assessed a civil penalty against Respondents for the first two listed violations.

On February 7, 2003, the Respondents contested the Administrator's determination and requested a hearing in accordance with 20 C.F.R. § 655.820. A hearing was held in New York City, New York on June 9, 10, 2003. Post hearing briefs were received from the Administrator on October 17, 2003 and from the Respondents on October 21, 2003. The Administrator filed a response to the Respondents' brief on October 31, 2003. The decision in this matter is based on the testimony at the hearing, all documentary evidence admitted into the record at the hearing, and the post hearing submissions by the parties.[1]

[1] The documentary evidence admitted at the hearing includes Administrative Law Judge Exhibit 1 (ALJx. 1), Administrator's Exhibits (*Ax.*) and Respondents' Exhibit 1 (*Rx 1.*) The transcript of the hearing is cited as "*Tr.*" and by page number.

Statutory Framework

The H-1B visa program permits employers to temporarily employ non-immigrants to fill specialized jobs in the United States. The Act requires that an employer pay an H-1B worker the higher of its actual wage or the locally prevailing wage, in order to protect U.S. workers and their wages. Under the Act, an employer seeking to hire an alien in a specialty occupation on an H-1B visa must receive permission from the U.S. Department of Labor ("DOL") before the alien may obtain an H-1B visa. The Act defines a "specialty occupation" as an occupation requiring the application of highly specialized knowledge and the attainment of a bachelor's degree or higher. 8 U.S.C. § 1184(i)(1). To receive permission from the DOL, the Act requires an employer seeking permission to employ an H-1B worker to submit a Labor Condition Application ("LCA") to the DOL. See 8 U.S.C. §1182(n)(1); *In the Matter of Eva Kolbusz-Kline v. Technical Career Institute,* Case No. 93-LCA-004, 1994 WL 897284, at *3 (July 18, 1994). Only after the employer receives the Department's certification of its LCA may the INS approve an alien's H-1B visa petition. 8 U.S.C. § 1101(a)(15)(H)(1)(B); 20 C.F.R. § 655.700.

The Act provides that the LCA filed by the employer with the Department must include a statement to the effect that the employer is offering to an alien provided status as an H-1B non-immigrant wages that are at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is higher, based on the best information available at the time of filing the application. 8 U.S.C. § 1182(n)(1)(A).

The Act directs the Department of Labor to review the LCA only for completeness or obvious inaccuracies. Unless the Department finds that the application is incomplete or obviously inaccurate, the Department shall provide the certification described by the Act within seven days of the date of the filing of the application. 8 U.S.C. § 1182(n)(1) and 20 C.F.R. § 655.740.

The Department has promulgated regulations which provide detailed guidance regarding the determination, payment, and documentation of the required wages. See 20 C.F.R. Part 655 Subpart H. The remedies for violations of the statute or regulations include payment of back wages to H-1B workers who were underpaid, debarment of the employer from future employment of aliens, civil money penalties, and other relief that the Department deems appropriate. 20 C.F.R. § 655.810 and § 655.855.

Statement of the Case

Respondents are Teacher's Placement Group, Inc. ("TPG"); Radha Vanjani, the President and owner of TPG; and her husband, Michael Vanjani, who founded TPG and runs the operations of TPG with Radha Vanjani.

TPG was founded in 1999 by Michael Vanjani with the purpose of locating, recruiting and hiring teachers from India to teach in school districts in the United States. *Ax. 32, p. 8.* Its

offices are in Plainview, New York. TPG presently employs teachers in school districts in Chester, Pennsylvania, Philadelphia, Pennsylvania and Cleveland, Ohio. *Ax. 32, p. 23.*

Respondents approached Newark Public Schools ("Newark") sometime during the year 2000 about the possibility of Newark using TPG's services. Their overture was rejected at that time by Randall Kanter, the Superintendent of Human Resources for Newark, because Newark would not, or could not, agree to an arrangement whereby its teachers would be paid by a party other than the school district. *Ax. 32, p. 19-21*.

Raymond Coleman was hired as a recruiter for Newark in January, 2001. Soon thereafter he was instructed by Kanter, his supervisor, to contact TPG to explore the prospect of TPG and Newark working together to obtain Mathematics and Science teachers for Newark. *Tr. 286*. Coleman contacted Michael Vanjani. He conveyed the impression that Newark was willing to work with TPG. Specifically, he told Michael Vanjani that he had a mandate from Marion Bolden, Newark District Superintendent, to "think outside the box" to obtain needed Math and Science teachers. *Ax. 32, p. 19*. Coleman understood from Respondents that TPG's working arrangement would be that TPG would be the employer of the teachers, and that the school district would pay TPG, who in turn would pay the teachers. *Tr. 288.* Coleman emphasized that Newark did not want to become involved in sponsoring foreign teachers. *Tr. 288, 289*. They discussed TPG's services and a future trip that TPG was taking to India accompanied by representatives of other school districts to recruit teachers. *Tr. 287.* About the same time Coleman contacted Dr. Joanne Emerson of the Chester Pennsylvania School District to discuss the performance of TPG teachers at her school district. Dr. Emerson made arrangements for Coleman to observe the TPG employed teachers at Chester. Coleman was satisfied with what he observed of the teachers' performance. He advised his supervisor that Newark should join the trip to India to assess the program's potential. Coleman's suggestion was accepted and he accompanied TPG on the recruiting trip to India on behalf of Newark. *Tr. 287.*

Coleman, along with Respondents, conducted interviews of 400 to 450 teachers from five different cities in India. He came away with an appreciation of the breath of available teachers from different locations in India. *Tr. 289.* During the trip through India, Coleman and Michael Vanjani discussed and agreed to the terms of a contract. *Tr. 290.* A draft of the agreement was finalized on July 3, 2001 and executed by Radha Vanjani for TPG and Marion Bolden, State District Superintendent for Newark. *Ax. 26.* Bolden did not sign the agreement on behalf of Newark until August 8, 2001, causing TPG concern as TPG was anxious to secure the relationship before it filed the non-immigrant H-1B visa petitions on behalf of the fifteen teachers. *Tr. 292, 293.* The contract provided in part that TPG shall be considered the prime contractor and the sole point of contact with regard to contractual matters, and that TPG would assume sole and full responsibility for the complete performance contemplated by the contract including the performance of all subcontractors. The contract provided further that all payments for services under the contract would be made only to TPG, and that all payments due the subcontractors under the contract would be the sole responsibility of TPG. The contract provided that its terms were not to be construed as creating a contractual relationship between any subcontractor and Newark. It was Coleman's understanding that under the contract the fifteen teachers were to be the employees of TPG. *Ax. 26.*

Respondents hired fifteen non-immigrant teachers from India to teach Mathematics and Science at Newark. In March 2001, Radha Vanjani, on behalf of TPG, filed an LCA with the DOL for the teachers. The LCA lists the job title as teacher and sets forth the prevailing wage as $18,680. *Ax. 31.* The LCA declares that TPG will pay to the teachers the higher of the prevailing wage or the actual wage. The prevailing wage was chosen from the Occupational Employment Wage Survey. The LCA was certified by the DOL on April 17, 2001. *Ax. 31.*

The fifteen teachers signed an Employment Agreement with TPG in June 2001. The agreement, which refers to TPG as "employer" and the teacher as "employee," provides that the employee would receive a minimum of $38,000 per annum, upon the successful passing of all Praxis examinations required for teacher certification in the teacher's subject area in New Jersey. Those teachers who did not pass the Praxis examination would receiver $22,000 per year. *Ax. 32, p. 42.*

TPG petitioned for and received H-1B visas for all fifteen non-immigrant teachers on August 30, 2001. *Ax. 1, Tab C.* The fifteen teachers arrived in Newark, New Jersey in late September or early October, 2001. *Tr. 46.* Upon their arrival, all the teachers signed a second contract called "Addendum to Employment Agreement." The addendum committed the teachers to stay with TPG for a period of at least three years, and provided penalties for leaving TPG for another United States employer during the first three years of their employment, although no damages would be owed if the teacher elected to return to India permanently. *Ax. 2, Tab P.* The same agreement had been signed by teachers working for TPG in the Philadelphia school system. *Ax. 32*, p. *46.* The teachers started working at Newark in early October, 2001. There was about a three month delay in paying the teachers. During this period each teacher received from TPG three advances of salary of $1,250 per advance. *Tr. 19.* The teachers repaid the $3,750 to TPG in December 2001, after they received their first pay.

The delay in the teachers receiving a salary other than the salary advances from TPG was the result of a delay in processing social security papers, confusion over the specific compensation each teacher was to earn, and how the teachers would be paid. *Tr. 299.* During this period there were ongoing discussions between Michael Vanjani and Coleman about pay arrangements for the teachers. Michael Vanjani stressed that TPG was to receive payment for the teachers from Newark as a vendor and that in turn TPG would pay the teachers. *Tr. 299.* Nevertheless, sometime in the latter half of November, Coleman informed Michael Vanjani that Kanter had decided that Newark could not make TPG a vendor and therefore the teachers would have to be paid directly by Newark. *Ax. 32, p. 53.* Michael Vanjani responded by explaining that under the H-1B provisions the teachers are TPG employees and TPG is required to pay them directly. His argument was to no avail. Coleman informed him that Newark's position was final, but Coleman offered an alternative arrangement which would enable TPG to be compensated. Newark would pay the teachers directly and t would arrange for money to be deducted from the teacher's pay check and paid to TPG. *Tr. 299-301*

Consequently, Kanter drafted a letter to Michael Vanjani dated November 16, 2001 stating:

> I wanted to take this opportunity [sic] re-visit our discussion regarding the payment arrangement between Newark Public Schools and Teacher Placement Group. As we discussed all teachers from India must be set up in our system as employees of the Newark Public School District. This is in line with the Teachers Exchange Program under which the teachers from India were hired. To help facilitate your getting paid, we are exploring the possibility of payroll deduction. Your cooperation in this matter is greatly appreciated.

Ax. 27.

In an attempt to accommodate Newark's position on payment of the teachers, Michael Vanjani met with Luna Velez, an assistant to Kanter, to establish the salary of each of the fifteen teachers. The teachers' salaries were to be set at the Newark salary scale minus twenty-five per cent, which would be paid to TPG, with a minimum salary of $38,500 per year. Michael Vanjani was informed by Coleman that it was TPG's responsibility to have the teachers authorize the deduction. *Tr. 306.* Consequently, Michael Vanjani met with the teachers on December 3, 2001 to discuss Newark's position on their pay structure and, in light of Newark's position, to ask the teachers to sign an agreement authorizing Newark to deduct 25% of gross salary as a fee to be paid to TPG, with no after deduction salary being less than $38,500. *Tr. 306*. The next day, December 4, 2001, Coleman addressed the teachers as a representative of Newark to explain Newark's arrangement with TPG and the payroll deductions. Coleman testified that he asked the teachers if they had any concerns that he could address as a representative of Newark, but no concerns were expressed. *Tr. 308, 309.*

All of the teachers signed the agreement with TPG authorizing the deduction and they subsequently signed an authorization for withholding in the office of Velez at Newark's Offices. Also present when they signed the withholding authorization was Michael Vanjani. Each teacher was told the amount they would receive in their pay after the 25% deduction. *Ax. 32, p. 59, 60.*

Mridula Bajaj is one of the teachers recruited by TPG to teach in the Newark school district. She has a Masters Degree in Organic Chemistry and a Bachelors Degree in Education. She is presently teaching Chemistry at Newark. *Tr. 8.* She taught in India for twelve years. Her salary in India was approximately $2,500 a year. Her husband was a Certified Public Accountant in India with a salary of $3,500 a year. *Tr. 34.* The contract that she signed with TPG states that her salary from TPG would be $22,000 until she passed the Praxis II test, at which time her salary would increase to a minimum of $38,000 per year. *Ax. 1, Tab O; Tr. 38.*

Baja testified about the meeting that she attended along with the other 14 TPG teachers on December 3, 2001. All the teachers were asked to sign the salary withholding form permitting Newark to deduct a fee equivalent to 25% of their salary to transfer to TPG. They were told that if they did not sign the withholding form they would cease to be employed by TPG. *Tr. 43.* Baja testified that one teacher refused to sign the withholding form. He was informed that he was no longer part of the program. The teacher recanted and signed the form. *Tr. 23.* At the meeting she was given a salary chart for the Newark Public Schools. Baja's gross salary under the Newark salary scale was $69,277. After the 25% deduction her salary was $51,000. *Tr. 44.*

Pushpalatha Sanjai has Masters Degrees in Mathematics and Education. She teaches Chemistry at Westside High School in Newark. *Tr. 48, 49.* She came to the United States under an H-1B visa sponsored by TPG. She signed the same contract with TPG as Bajaj, that is, she was to be paid $22,000 until she passed the Praxis II, at which time her salary would be increased to a minimum of $38,000. *Ax 12, Tab N; Tr. 52, 53.* Prior to accepting the position with TPG she had been earning about $780.00 a month as the head of the mathematics department in an international school in Malaysia. *Tr. 61.* Her testimony about the December 3, 2001 meeting was similar to the testimony of Bajaj. She left the meeting with the impression that she had to sign the agreement allowing the 25% withholding or she would no longer be employed by TPG. *Tr. 58-60.*

Sanjai testified that she received her first paycheck on December 17, 2001 from Newark for two and one half months salary, dating back to the first of October when she started. Twenty-five per cent was withheld for TPG. *Tr. 65.* Sanjai's wage under the Newark pay scale was $72,000.58. After the 25% deduction her salary was $54,043.50. *Tr. 81, 82.*

Maya Nayar teaches Mathematics in the third and fourth grade at Newark. She holds Bachelor Degrees in Mathematics and Education. *Tr. 89.* She came to the United States pursuant to an H-1B visa sponsored by TPG and under an employment contract with TPG. She signed the same contract with TPG as Bajaj and Sanjai, that is, she was to be paid $22,000 until she passed the Prexis II, at which time her salary would be increased to a minimum of $38,000. *Ax. 7, Tab I.* She attended the December 3, 2001 meeting called by Michael Vanjani. She was asked to sign the contract with Newark that provided permission for Newark to withhold 25% of her salary. She was informed by Michael Vanjani that if she did not sign the agreement she would be out of TPG's employ and would have to return to India. *Tr. 100.* Nayar received her first paycheck on December 12, 2001. It was paid by Newark. It did not have the 25% deduction taken out. She paid TPG the 25% by personal check. Her second paycheck from Newark had the 25% withheld. *Tr. 104.* The deductions from her paycheck continued until March or April of 2002. She was given by TPG a copy of the Newark teachers' pay scale. The scale showed her wage under the Newark pay scale to be $66,510. After the 25% fee to TPG was withheld, her salary was $49,882.50. *Tr. 113.*

Leo Simeon teaches Mathematics at Newark's Waynesburg Middle School. He came to this country pursuant to an H-1B visa sponsored by TPG and under an employment contract with TPG. *Tr. 118, 119.* The employment contract is the same as the one signed by Bajaj, Sanjai and Nayar, that is, he was to be paid $22,000 until he passed the Praxis II test, at which time his salary would be increased to a minimum of $38,000. *Tr. 121, 144.* Simeon received a letter from Newark dated June 25, 2001 stating that he had been selected as a teacher in its school district, "contingent upon presentation of an H-1B visa issued by INS; stating Teachers Placement Group as the employer." The letter informed that his salary would be $22,000 per year as a substitute teacher with the salary upped to $38,000 per year upon passing of the Praxis II test. *Tr. 144, 145; Ax. 2. Tab G.* Simeon started teaching at Newark on October 10, 2001. *Tr. 124.* He received his first paycheck on December 16, 2001. At the December 3, 2001 meeting he was presented with the salary scale for Newark teachers, and shown the contract permitting Newark to withhold the 25% fee for TPG. He testified that the teachers argued with Michael Vanjani for about three hours that they should not have to assent to the withholding. They were

told by Michael Vanjani that their options were to sign the agreement or be removed from the program. *Tr. 128.* Simeon's first two paychecks did not have the 25% fee withheld. Simeon wrote checks to TPG for the 25% fee. The 25% deduction was withheld from the third paycheck he received. It continued to be withheld until the first week of May, 2002. *Tr. 131.* Newark's salary scale for a teacher of Simeon's experience and qualifications was $53,350. He was paid $40,012.50 after the withholding was deducted.

Noor Alam teaches ninth and tenth grade Mathematics at the West Side High School in Newark. He has a Bachelors Degree in Science and Masters Degrees in Mathematics and Education. *Tr. 158.* He came to the United States from India pursuant to an H-1B visa sponsored by TPG and under an employment contract with TPG. *Tr. 163.* The employment contract is the same as the one signed by all the teachers from India; they would be paid $22,000 until they passed the Praxis II test, at which time their salary would be increased to a minimum of $38,000. *Tr. 162.* He was also presented with the contract to sign that permitted Newark to withhold the 25% fee for TPG. He testified that he objected, arguing that this was the first they had heard of the withholding fee, and that 25% was too much. He was told by Michael Vanjani that if he failed to sign, his principal would be notified the next day that he was no longer part of the program. *Tr. 168.* The Newark salary scale showed his salary as $72,000. After the 25% withholding his pay was $54,000. *Tr. 171, 196.*

Sometime shortly after signing the authorization form permitting Newark to withhold the 25% from their salary, probably in December, 2001, the teachers filed a grievance over the withholding with the Superintendent of Schools. *Tr. 312.* Newark took the position that the grievance of the 25% was not a School Board problem but a problem between TPG and the teachers. *Tr. 312.* The 25% withholding continued until May, 2002 when the teachers signed a document at the teachers union office informing Newark that it was revoking authorization for the 25% deduction. *Tr. 31.* Newark subsequently became the sponsor of the 15 H-1B visas and their employer. A Civil Action for damages was filed in the United States District Court by Respondents against the Newark Public School District and the fifteen teachers. *Ax. 20; Ax. 34; Ax. 35.*

DISCUSSION

TPG is in the business of recruiting and supplying Mathematics and Science teachers from India to school districts in the United States who apparently are unable to find qualified United States citizens to teach those courses. In this case Respondents, with the assistance of a recruiter employed by Newark, interviewed and hired 15 nationals of India to teach in the Newark Public School System. All had at least Bachelors Degrees and most had Masters Degrees in Science or Mathematics and Education.

The crux of this case is whether TPG should be found to have willfully failed to pay "required wages" to those teachers whom it placed with Newark pursuant to an LCA and H-1B visas it obtained, because of the necessity of following a mechanism imposed upon it by Newark, contrary to earlier agreements between TPG and Newark, for paying the teachers.

Required Wage

The Act requires that an LCA filed by an employer must include a statement that the employer will offer to aliens during the period of authorized employment as an H-1B non-immigrant, wages that are at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specified employment or the prevailing wage level for the occupational classification, whichever is greater. 8 U.S.C. § 1182(n)(1)(A). The higher of the prevailing wage rate or the actual wage is referred to by 20 CFR § 655.731(a) as the required wage rate.

Prevailing Wage

The Administrator charges Respondents with failing to establish a proper prevailing wage on its LCA. TPG chose a prevailing rate of $18,680. To support its charge, the Administrator offers the testimony of Mary Dodds, Enforcement Coordinator for the DOL, Wage and Hour Division. Dodds testified that the prevailing wage chosen by TPG is applicable to teachers, but is available only to educational institutions, and since TPG is not an educational institution, TPG "should have chosen the rate that's…slightly higher than this." *Tr. 222.* Dodds did not specify the "slightly higher" rate.

20 C.F.R. § 655.731(d), *enforcement actions*, provides that in the event of an investigation for failure to meet a prevailing wage condition where the Administrator has reason to believe that the prevailing wage finding obtained by the employer *varies substantially* from the wage prevailing for the occupation, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as a basis for determining violations. Here, as TPG points out in its post hearing brief, the Administrator never contacted the ETA to provide a prevailing wage determination. Rather, the Administrator was satisfied to support its charge that TPG should be found to have violated the terms of its LCA by testimony that the correct prevailing wage was "slightly higher." The Administrator asserts in a letter of reply to the TPG's post hearing brief that no alternate prevailing wage was requested from ETA because the actual wage was higher.

The Administrator has taken upon himself a difficult burden when he charges Respondents with a violation based on Respondents' choice of a prevailing wage when; 1) the wage rate the Administrator asserts should have been used was only slightly higher than the rate chosen by TPG; 2) the rate chosen by TPG would have to "vary substantially" from the Administrator's wage rate to constitute a violation; 3) the Administrator thought that determining the true prevailing wage was unnecessary since the actual wage was higher and constituted the required wage; and 4) the actual wage rate used by TPG was significantly higher than the prevailing wage.

In any event, the Administrator has not met the burden as the record does not support a finding that the prevailing wage used by TPG varies substantially from an unknown "slightly higher" prevailing wage the Administrator contends should have been chosen.

Actual Wage

The Administrator charges that TPG willfully failed to pay the non-immigrant teachers the required wage during the period of October 6, 2001 through May 18, 2002. As the required wage is defined by § 655.715 as the higher of the prevailing wage and the actual wage, and the actual wage is the higher wage here, the charge is in actuality an assertion that TPG failed to pay the required actual wage.

The definition of actual wage is the wage rate paid by the employer to all individuals with experience and qualifications for the specific employment in question at the place of employment. *See* 20 C.F.R. § 655.715. Section 655.731(a)(1) provides that where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B non-immigrant by the employer.

Initially, the parties agree that during the period in question TPG was the teachers' employer, not Newark. *Tr. 220.* Had Newark been their employer, then the actual wage rate would have been the wage Newark pays to its teachers pursuant to its collective bargaining agreement with the teachers union. As TPG is the employer the wage scale set forth in the collective bargaining agreement has no bearing on the actual wage rate.[2]

The actual wage then is the higher of the salary set forth in the agreement TPG signed with the non-immigrant teachers, or the salary that TPG actually paid the teachers. TPG signed a salary agreement with each teacher providing a salary of a minimum of $38,500. The teachers who were called as witnesses all testified to the amounts presented to them by Michael Vanjani as their wages, based on their qualifications and experience. Those wages ranged from $40,012 to $54,000.

The Administrator agrees that these amounts would constitute the actual wage, and TPG's payment of same to the teachers would be in accord with the LCA, if the wages were paid directly by TPG. Dodds testified:

Q. If TPG has been the source of payroll for all of these teachers and they had all received $38,000 a year and they had come to you and said, Ms. Dodds, I'm very unhappy because other teachers in the Newark School District get $72,000 a year and I only get $38,000 a year, how would you have responded to them?

A. Well…I admit that if TPG, with everything that I know now, if TPG had been the employer and paid that way, they would have been in compliance.

Q. So that in fact, the teachers would have no leg to stand [on]. They would have had no cause to complain if the simple fact of having been [paid] out of TPG's pocket as opposed to Newark Public Schools pocket?

A. Right. *Tr.60.*

[2] *See* testimony of Mary Dodds, p. 244.

Thus, the Administrator's charge that Respondents should be assessed a civil penalty for a willful failure to pay the required wage is the consequence of the dispute between TPG and Newark over the mechanism for payment of the teachers. The mechanism for payment resulted from Newark's shifting understanding of its agreement with TPG. The initial discussions between TPG and Newark went nowhere because Newark could not agree to an arrangement where Newark would not be the entity paying the teachers. When Newark subsequently approached TPG to re-visit the discussions, TPG believed that Newark was agreeable to an arrangement whereby Newark would contract with TPG for its services. Coleman told Michael Vanjani that he had a mandate from Marion Bolden, Newark District Superintendent, to obtain for Newark the needed math and science teachers, and that he would make sure that Bolden would make TPG a vendor. *Tr. 28.* TPG was also told that Newark was unwilling to become involved in the sponsorship of visas for foreign teachers.[3] When Coleman proceeded to evaluate TPG's services by observing its teachers in the Chester Pennsylvania School System, and later accompanied TPG to India to interview prospective teachers, it was with the understanding that the teachers would be employees of TPG. Coleman testified that Michael Vanjani was very clear that TPG would be the employer, and Coleman understood that TPG's arrangements with the other school districts was that the school district paid TPG and TPG, in turn, paid the teachers. *Tr. 288.* The contract subsequently signed on August 8, 2001, by Bolden on behalf of Newark, formalized this understanding. It was with this understanding that TPG hired the fifteen teachers to teach in Newark under the LCA, and obtained the H-1B visas.

When Newark announced its insistence on paying the teachers directly, and offered salary deduction as the means for TPG to receive compensation, TPG was left in a dilemma--should TPG reject Newark's plan or try to make it work? In reality, TPG was left with no other recourse but to follow Newark's directions. TPG could have walked away from Newark and considered its expense and effort to bring these teachers to Newark a subsidization of Newark with mathematic and science teachers. However, TPG was the employer and sponsor of these non-immigrant aliens, and Newark was adamant that it did not want to have anything to do with the sponsorship. TPG could have withdrawn the teachers, who continued to be its employees, from Newark and attempted to place them in the other school districts where its teachers taught, but Newark's decision came in December, half way through the school year, and TPG as their employer under the LCA and the sponsor of their H-1B visa, would have had to continue to pay the teachers' salary until they were placed in a teaching position. *See* Section 413(a) of Act, 8 U.S.C. § 1182(n)(2)(C)(vii). In any event, TPG went along with Newark's approach because it had no other option.[4] Nevertheless, the wage listed as the teachers' gross pay by Newark bore no relation to the teachers' "actual pay."

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[3] Coleman testified: "I made it clear from the very beginning that Newark Public Schools did not want to get into the sponsorship program with foreign teachers. That's – that was something we did not want to do. We didn't have the funds. It was not a program that we were familiar with. This was a brand new program concept, the idea of bringing foreign teachers in. So, the worse case scenario was we did not want to get into sponsoring teachers – you know, someone else handle it." *Tr. 288, 289*.

[4] In a further effort to accommodate Newark's withholding plan, TPG hired a CPA to assist the teachers prepare their income taxes so they would not pay taxes on income prior to the 25% deduction. *Tr. 198.*

The Administrator argues that the wage listed as gross pay on the teachers' paychecks, prior to the deduction by Newark for payment to TPG, constitutes the actual wage notwithstanding that TPG never paid the teachers, or intended to pay the teachers, that high. TPG's wage scale for each teacher was the Newark wage scale minus the 25% deducted for TPG's expenses and profit.[5] To argue that the gross pay prior to the deduction constituted the actual wage ignores the reality of the quandary in which TPG found itself. It was only because Newark refused to pay TPG for the teachers' services, and instead insisted on paying the teachers directly, that there was the need for this salary deduction mechanism, a fiction whereby Newark acted as the employer for pay purposes, and reverted to a deduction mechanism to make TPG whole.

In support of the argument that the gross salary indicated on each teacher's pay stub was the required wage, the Administrator points to the definition of "Cash wages paid" at 20 CFR § 655.731(c)(2) and the definition of "authorized deductions" at § 655.731(c)(9).[6] However those sections are inapplicable here. The purpose of §§ 655.731(c)(2) and 655.731(c)(9) is to specify "allowable deductions" which may lower the "cash wages paid" below the required wage. These include such payments as those to IRS, and FICA. Obviously, deductions such as the payment to TPG are not authorized as a reduction from "cash wages paid." However the deductions to TPG are not from the required wage but are from the gross pay. They do not reduce the required wage, rather they reduce the payment from Newark to the level of required wage by subtracting the compensation due to TPG. The salient point is that the payment by Newark, listed as gross wage on the teachers' pay check, is intended to compensate both the teachers and TPG.

The Administrator has not shown that TPG did not pay the wage required by its LCA to the fifteen non-immigrant teachers it employed to teach at Newark.

Business Expense

The Administrator contends that $3,050 was improperly collected by TPG from each of the teachers for re-imbursement of business expenses connected to the performance of H-1B program functions.

20 C.F.R. § 655.731(c)(9)(iii)(c) provides that authorized deductions from an employer's wage can not include a recoupment of the employer's business expenses. Provided examples of unauthorized deductions are attorney fees and other costs connected to the performance of the H-1B program that are required to be performed by the employer. 20 C.F.R. § 655.731(c)(10)(ii) provides that an employer may not receive, and the H-1B non-immigrant may not pay, any part of the $1,000 filing fee.

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[5] Coleman testified that 25 to 40% is a standard recruitment fee. *Tr. 317*.

[6] "Authorized deductions" is defined at 20 C.F.R. § 655.731(c)(2) for the purpose of the satisfaction of the employer's H-1B wage obligation.

TPG assessed each of the 15 teachers a fee of $7,000 to participate in the program, about $5,000 of which was payable in India, and the other $2,000 payable upon arrival in the United States. Exhibit A24 identifies generally how $5,400 of the $7,000 was spent. Dodds reviewed Exhibit A24 and determined that $3,050 was for business expenses that can not be assessed by TPG against the teachers under § 655.731(c)(9)(iii)(c). The expenses included a $1,000 filing fee for the H-1B visa that cannot be collected from a non-immigrant alien under § 655.731(c)(10)(ii). TPG does not contest Dodds' characterization of these expenses. Rather, TPG argues that the Administrator failed to recognize that TPG provided certain services to its teachers over and above those normally provided by an employer, which were not entered into the calculations such as assistance with obtaining social security numbers and drivers' licenses. Respondents provided email records to show that TPG purchased airline tickets, arranged for continuing education, assisted in travel arrangements for the teachers' families, picked teachers and teachers' families up at the airport, and drove teachers to Trenton, New Jersey so they could be issued driver's licenses. *Rx. 1.*

TPG may well have provided such assistance without cost to the teachers, but, nevertheless TPG can not offset the cost of such assistance by charging the cost of its own business expenses connected to the H-1B program to the teachers. TPG shall reimburse each teacher for the $3,050 it required the teachers to pay contrary to §§ 655.731(c)(9)(iii)(c) and 655.731(c)(10)(ii).

Discrimination

The Administrator asserts that Respondents engaged in prohibited discriminatory conduct under § 655.801 when they required the teachers to sign the form authorizing Newark to withhold the 25% deduction. As previously discussed, Newark shouldered TPG with the responsibility for obtaining the authorization from the teachers when it offered paycheck withholding as the means of compensating TPG for providing mathematics and science teachers.

20 C.F.R. § 655.801(a) provides:

(a) No employer…shall intimidate, threaten, coerce, blacklist, discharge, or in any other manner discriminate against an employee(which term includes a former employee or an applicant for employment) because the employee has--

(1) Disclosed information to the employer, or to any person, that the employee reasonably believes evidences a violation of section 212(n) of the INA or any regulation relating [thereto]; or
(2) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of section 212(n) of the INA or any regulation relating to section 212(n).

Thus, for an employer's actions toward an employee to be considered discriminatory under § 655.801(a), the conduct must be in retaliation for whistle blowing activity, that is, the result of the employee disclosing information that reasonably evidences a violation of the INA,

or in retaliation for the employee's cooperation in an investigation concerning the employer's compliance with the INA.

Here, the conduct described by the Administrator as discriminatory was not in response to a disclosure of a violation or the participation in an investigation. Rather, the signed authorizations were necessary for implementation of Newark's method of paying the teachers and compensating TPG without treating TPG as a vendor.

All five of the teachers who testified expressed displeasure with being required to sign the form authorizing the 25% deduction. Their reaction was understandable. The first they had heard of the withholding was at the December 3, 2001 meeting, and they had yet to be informed of the actual amount of their wage. They all testified that they felt pressured to sign the authorization. They were under the impression that they had to sign the agreement or they would be out of the program. *Tr. 21*.

Nevertheless, Respondents' conduct in informing the teachers that they had to sign the withholding authorizations was not a violation of § 655.801 as it was not retaliatory, and it did not require the teachers to accept wages lower than the required wage. The problem was not with the wage that the teachers were being required to accept, but with the understandable, yet incorrect, perception by the teachers that TPG was requiring them to authorize the withdrawal of money to which the teachers were entitled.

The Administrator has not sustained its burden of showing that TPG violated § 655.801(a) by retaliating against the teachers for disclosing information that evidences a violation of the INA, or for cooperating in an investigation concerning the employer's compliance with the INA.

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondents shall pay to the Department of Labor $3,050 for each of the fifteen non-immigrant teachers it sponsored for H-1B visas;

2. The Department of Labor's complaint that Respondents willfully failed to pay required wages is dismissed;

3. The Department of Labor's complaint that Respondents discriminated against the fifteen non-immigrant teachers contrary to § 655.801 is dismissed;

4. The Department of Labor's complaint that Respondents failed to establish a prevailing wage rate in compliance with TPG's Labor Condition Application is dismissed; and

5. The Department of Labor's assessment of a civil penalty against Respondents is dismissed.

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THOMAS M. BURKE
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 655.845, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, D.C. 20210, by filing a petition to review the Decision and Order. The petition for review must be received by the Administrative Review Board within thirty calendar days of the date of the Decision and Order. Copies of the petition shall be served on all parties and on the administrative law judge.